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Opinion No. 04-074

Constitutionality of Decoupling Former Governors' Retirement Allowance from Increase in Governor's Salary

QUESTION

Whether a bill which would grant a raise in salary to the governor elected in November 2006 but which would exclude former governors and their widows from benefitting from that increase through their retirement allowance is constitutional?

OPINION

A bill which would exclude former governors and their widows from benefitting through their retirement allowance from a raise for the governor elected in November 2006 would be unconstitutional, since it would diminish the retirement benefits to which former governors are entitled under the law in effect during their term of office and would thus violate Article III, §7, of the Tennessee Constitution and impair the obligation of contracts under Article I, §20, of the Tennessee Constitution and Article I, §10, of the United States Constitution.

ANALYSIS

The current law provides that the governor's salary shall be \$85,000 a year. Tenn. Code Ann. §8-1-102. Any former governor upon reaching sixty-five years of age is eligible for a retirement allowance. Under present law, the retirement allowance is equal to fifty percent of the then current annual salary of the office of the governor. Tenn. Code Ann. §8-39-202 provides:

- (a) Any former governor, upon reaching sixty-five (65) years of age, shall be eligible to receive a retirement allowance.
- (b) The amount of such retirement allowance shall be an amount per annum equal to fifty percent (50%) of the then current salary of the office of the governor, payable in twelve (12) equal monthly payments, to commence on the first day of the month following the

former governor's sixty-fifth birthday and to be payable monthly thereafter for life.

The proposed legislation would increase the governor's salary to equal the salary of the Chief Justice of the Supreme Court. However, the legislation would also limit the retirement allowance of all former governors retiring before the effective date of the bill and their surviving spouses to fifty percent of \$85,000. Only governors retiring after the effective date would receive a retirement allowance of fifty percent of the increased salary. The proposed legislation, Amendment 3 to Senate Bill 3136, reads as follows:

Notwithstanding the provisions of Section 8-39-202(b) to the contrary, the retirement allowance for any governor retiring before the effective date of this act, or the retirement allowance of a surviving spouse of a former governor receiving benefits before the effective date of this act, shall be based on a gubernatorial salary of eighty-five thousand dollars (\$85,000).

Article I, §20, of the Tennessee Constitution and Article I, §10, of the United States Constitution prohibit the making of a law impairing the obligation of contracts. In addition, Article III, §7, of the Tennessee Constitution provides that the governor shall receive a compensation for his services, which shall not be increased or diminished during the period for which he shall have been elected. It is clear that pension benefits are a type of compensation within the meaning of the Constitution. *Roberts v. Tenn. Consol. Ret. Sys.*, 622 S.W.2d 544 (Tenn. 1981). The State of Tennessee entered into a contract with the current and former governors when they entered office. The State in effect agreed to pay retirement benefits in accordance with the law in effect at that time. *Miles v. Tennessee Consolidated Retirement System*, 548 S.W.2d 299, 304 (Tenn. 1976) (an analogous case dealing with pension benefits for judges, holding that changing pension benefits was unconstitutional). *See also Blackwell v. Quarterly County Court of Shelby County*, 622 S.W.2d (Tenn. 1981). The contractual rights acquired by the governors vested when they assumed office since the only prerequisite for receiving the retirement allowance under Tenn. Code Ann. §8-39-202 is that one be a "former governor" who took office after §8-39-202 was enacted.

If the proposed legislation were enacted, it would deny former governors their contractual rights which have already vested. The law in effect at the time they entered office stated that they were to receive a retirement allowance of fifty percent of the current salary of the governor, not half of \$85,000. Tenn. Code Ann. §8-39-202. Thus, contractually the State is obligated to pay them, once they reach retirement age, half of the salary of the governor at any future time. This requirement stems not from the Constitution itself, but from the law in effect at the time the governors rendered their service. But once the State has so obligated itself the Constitution prevents it from diminishing that obligation. A retirement benefit based on future salary levels is a more valuable form of compensation than a benefit that can be decoupled from those possible future increases.

Therefore, if the legislature increases the salary of the governor, the State is obligated to pay former governors who took office after §8-39-202 was enacted half of that increased salary once they reach retirement age. If the legislature should pass a law that denies former governors their right to receive a retirement allowance equal to half of the new higher salary of the governor, that law would violate Article III, §7, by reducing the former governor's compensation, and it would violate Article I, §20, of the Tennessee Constitution and Article I, §10, of the United States Constitution by impermissibly impairing the former governors' contractual rights. The legislature does not have the power to modify vested pension benefits unless it can show that a vital interest of the State would be protected by an exercise of the police power. *Miles*, 548 S.W.2d at 305 (quoting *Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95 (1938)). There does not appear to be any vital interest of the State that would be protected by denying former governors their contractually vested retirement allowances.

The Tennessee Supreme Court in *Miles* held that it would be unjust and inequitable, following justified reliance, to permit any tampering, statutorily or otherwise, with pension benefits. *Miles*, 548 S.W.2d at 305. Citing the "Pennsylvania Rule" from *Hickey v. Pittsburgh Pension Bd.*, 106 A.2d 233, 237-38 (Pa. 1954), the Court held that the Legislature must not impair the obligations of contract:

The legislature may strengthen the actuarial fibers but it cannot break the bonds of contractual obligations. The permissible changes, amendments and alterations provided for by the Legislature can apply only to conditions in the future, and never to the past. According to the cardinal principle of justice and fair dealings between government and man, as well as between man and man, the parties shall know prior to entering into a business relationship the conditions which shall govern the relationship. Ex post facto legislation is abhorred in criminal law because it stigmatizes with criminality an act entirely innocent when committed. The impairment of contractual obligations by the Legislature is equally abhorrent because such impairment changes the blueprint of a bridge construction when the spans are half way across the stream.

Miles, 548 S.W.2d at 306.

A law such as the one addressed in this Opinion would retroactively deny former governors vested contractual rights by reducing their compensation and would thus be unconstitutional.

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